

Dated: December 22, 2003

PERSONNEL BULLETIN NO. 04-02

SUBJECT: TAKING PERFORMANCE-BASED ACTIONS UNDER A PASS-FAIL PERFORMANCE SYSTEM and ISSUANCE AND OF NEW APPRAISAL FORM

- 1. Purpose.** This bulletin provides clarification on Merit Systems Protection Board (MSPB) decisions involving the Department's current performance appraisal system. It also provides guidance on writing a solid performance improvement plan (PIP) when taking a performance-based action.
- 2. Authority.** 5 U.S.C. Chapter 43, 5 C.F.R. Part 432.
- 3. Clarification of MSPB Decisions.**
 - a. In Willena Johnson v. Department of the Interior, the MSPB found that the performance standards (called performance indicators by the Department) were absolute, thus invalid. (Absolute performance standards are ones that allow for no margin of error. In other words, one instance of failing to meet a performance indicator would cause an employee to fail the corresponding critical result.) Only one performance indicator in the PIP was found to include an acceptable amount of detail for the employee to understand what was expected of her. Significantly, Johnson v. Interior did not invalidate the Department's performance appraisal system because the decision was based solely on the performance appraisal form and PIP given to the employee. The original performance appraisal form was signed on November 14, 1997, prior to the update of the Department's performance appraisal form. In addition, the PIP did not "flesh out" the performance measurements, as it should have.
 - b. In Rebecca Ballew v. Department of the Interior, the judge dismissed the language on the performance form that expressly states that the performance indicators will not be applied in an absolute manner. Instead, he relied on the *Johnson* case in support of his determination that the performance indicators were absolute. The finding of absolute standards is still not a fatal error. Past MSPB decisions have made it clear that any error in the performance plan may be remedied in the PIP. Unfortunately, the PIP in *Ballew* did not provide adequate detail to let the employee know what was expected of her.
 - c. Since the *Johnson* and *Ballew* cases will be referred to in future MSPB proceedings, it is advisable to address the issue of whether the performance indicators are absolute

performance standards, as a matter of course, whenever defending performance-based actions on appeal. This will show that the prior problem with the performance indicators has been corrected and will ensure that this corrective action is made part of the record.

d. In 1997, prior to the update of the DI-2002, the Department prevailed in the performance-based case of Janet A. Bell v. Department of the Interior--despite the allegation of absolute standards--because the removal was based solely on the 30-day PIP and because the PIP was well-written and sufficiently detailed.

4. **Analysis.** Analysis of these three cases verifies that the success of a performance-based action is dependent upon the quality of the PIP. A well-developed PIP is essential to ensure that performance expectations are properly communicated. The PIP must not rely solely on the text of the performance indicators on the performance appraisal form. Instead, it must specify the performance requirement and exactly how an employee's performance will be measured. This is explained in greater detail below.
5. **Counseling.** Under the Department's Performance Appraisal System, 370 DM 430, a supervisor is required to provide two progress reviews during the rating period for each employee. In general, good supervision requires ongoing communication with an employee about his or her performance. Frequent feedback, both positive and negative, ensures that an employee understands what is expected. This is especially important under a pass-fail appraisal system that uses generic performance indicators. Effective counseling and assistance during the rating year may help the employee avoid or improve poor performance before it becomes necessary to take an adverse action.
6. **Performance Improvement Plans.** In situations in which performance does not improve, it is not necessary, nor is it advisable, to wait until the end of the rating period to take remedial action. If at any time during the rating period, an employee's performance is determined to be unacceptable ("Results Not Achieved"), in one or more critical results, the employee will be given a PIP. A PIP under a 2-level performance appraisal system is the same as a PIP under a 5-level system. It involves the development of a *detailed* written performance plan for the purpose of providing the employee the opportunity to demonstrate acceptable performance.

a. Essential elements of a PIP include, in writing:

- A statement that the employee's performance is determined to be unacceptable in one or more critical results and that performance must be brought up to an acceptable level.
- The specific critical results which the employee is failing and what is needed to bring performance up to an acceptable level (clearly state the requirements and expectations by which the employee's performance will be judged).

- An explanation of what assistance will be provided.
- The consequences of failing to improve during the opportunity period (e.g., reduction in grade or removal).
- The duration of the opportunity period. This is based on the time needed to demonstrate acceptable performance. The PIP is normally 45 – 90 days.

b. The performance indicators used in the Department's performance plan are generic and do not contain the level of specificity required in a PIP. A PIP is specifically written for the employee who is found to be failing one or more critical elements. When drafting the PIP, avoid the appearance of requiring perfection at the Fully Satisfactory or "Results Achieved" level. For example, the standard "Work is timely" may be interpreted to mean that *all* of the employee's work must be completed on time without exception, i.e., there is no allowance for error. And unlike the performance appraisal plan – in which the performance indicators are modified by the term "generally" – a well-developed PIP will state the specific number of errors in timeliness that will be considered acceptable. Sometimes it is helpful to measure performance numerically, e.g., no more than two revisions will be required to a document. However, using percentages can create a burden for the supervisor because it requires that 100% of the documentation be retained for evaluation to demonstrate that the specified percentage set forth in the PIP (e.g., 75% of documents are correct on the first draft) was correctly measured.

c. During the opportunity period the employee's progress must be documented and appropriate assistance provided. Documentation should include notes of all routine meetings with the employee, and a record of when assignments were given to the employee and what instructions were provided. Additional assistance may include closer supervision in the form of regularly scheduled meetings between the employee and supervisor, special assignments, training, peer coaching, and checklists. It is also a good idea to refer the employee to the Employee Assistance Program in case the employee is having some problem that is negatively affecting his or her ability to work. If the employee is still performing at an unacceptable level at the end of the opportunity period, further action must be taken.

d. As always, supervisors must seek assistance from their servicing personnel office before taking action. Servicing personnel offices should consult with the Solicitor's Office prior to issuing a PIP or taking any adverse action.

7. **Additional Case Law.** A recent MSPB decision, Thompson v. Navy, 89 MSPR 188 (2001), reaffirmed that the purpose of a PIP is to clarify, but not substantially change, an employee's critical results and indicators and to offer additional guidance on what an employee must do to in order to reach an acceptable level of performance. Of particular interest is the Board's statement that "an agency may cure otherwise fatal defects in the development and communication of performance standards by communicating sufficient information regarding performance requirements at the beginning of -- and even during -- the PIP," Id. at 195. This decision reinforces the importance of the PIP in a performance-based action.

8. **Probationary Employees.** Probationary or trial employees can be terminated for performance deficiencies without being placed on a formal PIP. This is because the entire probationary period is similar to an opportunity period, with employees receiving closer supervision, frequent instruction, and both formal and on-the-job training as needed throughout the year. Effective counseling and assistance during the probationary period may help the employee avoid or improve poor performance before it becomes necessary to take an adverse action.
9. **Alternative Process.** Consideration may also be given to proceeding under 5 CFR 752, Adverse Actions, rather than under 5 CFR 432. The specific facts of a case, along with the weight of evidence, will be determining factors in deciding under which authority to take an action.
10. **Performance Appraisal Form DI-2002.** The revised version of the Department of the Interior's performance appraisal form, DI-2002, is attached. The attached form replaced the performance appraisal form found in 370 DM 430, Appendix B.
11. **Additional Resources.**
 - a. DOI Performance Appraisal System, 370 DM 430,
www.doi.gov/hrm/guidance/currenonly.htm
 - b. DOI Personnel Manager, Dealing with Poor Performers,
www.doi.gov/hrm/pmanager/er5.html
 - c. OPM Resource Center for Addressing and Resolving Poor Performance,
www.opm.gov/er/poor/index.asp

-Signed By-

Carolyn Cohen
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Attachment

This bulletin supersedes Human Resources Management Bulletin 97-3, dated 12/26/97.

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